WARNING

This appeal is subject to a mandatory publication ban under s. 278.9. This section of the *Criminal Code* provides:

> **278.9 (1)** No person shall publish in any document, or broadcast or transmit in any way, any of the following:
>
> > **(a)** the contents of an application made under section 278.3;
> >
> > **(b)** any evidence taken, information given or submissions made at a hearing under subsection 278.4(1) or 278.6(2); or
> >
> > **(c)** the determination of the judge pursuant to subsection 278.5(1) or 278.7(1) and the reasons provided pursuant to section 278.8, unless the judge, after taking into account the interests of justice and the right to privacy of the person to whom the record relates, orders that the determination may be published.
>
> **(2)** Every person who contravenes subsection (1) is guilty of an offence punishable on summary conviction.

WARNING

The President of the panel hearing this appeal directs that the following should be attached to the file:

An order restricting publication in this proceeding under ss. 486.4(1), (2), (2.1), (2.2), (3) or (4) or 486.6(1) or (2) of the *Criminal Code* shall continue. These sections of *the Criminal Code* provide:

> 486.4(1) Subject to subsection (2), the presiding judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of
>
> (a) any of the following offences;
>
> (i) an offence under section 151, 152, 153, 153.1, 155, 160, 162, 163.1, 170, 171, 171.1, 172, 172.1, 172.2, 173, 213, 271, 272, 273, 279.01, 279.011, 279.02, 279.03, 280, 281, 286.1, 286.2, 286.3, 346 or 347, or
>
> (ii) any offence under this Act, as it read from time to time before the day on which this subparagraph comes into force, if the conduct alleged would be an offence referred to in subparagraph (i) if it occurred on or after that day; or
>
> (b) two or more offences being dealt with in the same proceeding, at least one of which is an offence referred to in paragraph (a).
>
> (2) In proceedings in respect of the offences referred to in paragraph (1)(a) or (b), the presiding judge or justice shall
>
> (a) at the first reasonable opportunity, inform any witness under the age of eighteen years and the victim of the right to make an application for the order; and
>
> (b) on application made by the victim, the prosecutor or any such witness, make the order.
>
> (2.1) Subject to subsection (2.2), in proceedings in respect of an offence other than an offence referred to in subsection (1), if the victim is under the age of 18 years, the presiding judge or justice may make an order directing that any information that could identify the victim

shall not be published in any document or broadcast or transmitted in any way.

(2.2) In proceedings in respect of an offence other than an offence referred to in subsection (1), if the victim is under the age of 18 years, the presiding judge or justice shall

(a) as soon as feasible, inform the victim of their right to make an application for the order; and

(b) on application of the victim or the prosecutor, make the order.

(3) In proceedings in respect of an offence under section 163.1, a judge or justice shall make an order directing that any information that could identify a witness who is under the age of eighteen years, or any person who is the subject of a representation, written material or a recording that constitutes child pornography within the meaning of that section, shall not be published in any document or broadcast or transmitted in any way.

(4) An order made under this section does not apply in respect of the disclosure of information in the course of the administration of justice when it is not the purpose of the disclosure to make the information known in the community.

486.6(1) Every person who fails to comply with an order made under any of subsections 486.4(1) to (3) or subsection 486.5(1) or (2) is guilty of an offence punishable on summary conviction.

(2) For greater certainty, an order referred to in subsection (1) applies to prohibit, in relation to proceedings taken against any person who fails to comply with the order, the publication in any document or the broadcasting or transmission in any way of information that could identify a victim, witness or justice system participant whose identity is protected by the order.\

COURT OF APPEAL FOR ONTARIO

CITATION: R. v. D.F., 2023 ONCA 584
DATE: 20230911
DOCKET: C70499

Hourigan, Brown and Monahan JJ.A.

BETWEEN

His Majesty the King

Respondent

and

D.F.

Appellant

Lance Beechener and Brendan Monk, for the appellant

Étienne Lacombe, for the respondent

Heard: August 15, 2023

On appeal from the convictions entered on June 17, 2021 and the sentences imposed on September 10, 2021 by Justice Bernd E. Zabel of the Ontario Court of Justice.

Monahan J.A.:

A. OVERVIEW

[1] The appellant was convicted of sexual assault, sexual interference, and making sexually explicit materials available to the complainant, who was eight years old at the relevant time. Taking into account 26 months of pre-sentence custody, the appellant was sentenced to three years of imprisonment for sexual

interference, and 18 months, to be served concurrently, for making sexually explicit material available to a child.[1]

[2] The appellant now appeals his convictions on two related grounds: (i) the trial judge misapprehended key parts of the complainant's evidence, with that misapprehension being material and essential to the reasoning process leading to the appellant's conviction; and (ii) the trial judge's reasons were insufficient, since he failed to resolve major inconsistencies in the evidence of the complainant and her mother, M.C.

[3] The respondent Crown argues that the trial judge did not misapprehend the complainant's evidence but, rather, merely disregarded her evidence on whether her mother was present when the appellant sexually touched her. Further, the Crown maintains that the trial judge provided sufficient reasons that disclosed an intelligible basis for his findings of guilt.

[4] While I would dismiss the appeal on the count of making sexually explicit materials available to a person under 16, I would set aside the convictions for sexual assault and sexual interference.

[5] In my view, the trial judge's reasons misapprehended the complainant's evidence in a key area, namely, whether her mother was present at the time of the

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[1] The appellant received a conditional sentence for the sexual assault conviction on the basis that the facts underlying the convictions for sexual assault and sexual interference were identical.

alleged sexual touching. This misapprehension was on a matter of substance, related to material issues at trial, and played an essential role in the trial judge's reasoning process in relation to his findings of guilt for sexual assault and sexual interference. Moreover, because of this misapprehension, the trial judge's reasons failed to grapple with inconsistencies between the evidence of the complainant and that of M.C., which was a key issue in the case.

[6] In my view, the impact of these two related errors is such that the convictions for sexual assault and sexual interference must be set aside and a new trial ordered on those counts.

B. BACKGROUND

[7] The incidents which led to the charges in this case occurred in April 2020 at a townhouse where the then-eight-year-old complainant lived with her mother, M.C., and the complainant's two younger siblings.

[8] The appellant had met M.C. in 2016, and they had subsequently visited each other on a number of occasions. However, prior to April 2020, the appellant had never met the complainant.

[9] M.C. testified that one day in April 2020, the appellant came over to her townhouse for a daylong visit. According to M.C., two of her children, including the complainant, were home that day. M.C. said that the appellant spent the day "hanging out" at the townhouse with her and the two children.

[10] Later in the day, M.C. prepared dinner in the kitchen while the appellant entertained the two children in the living room. M.C. testified that the living room and kitchen were effectively two parts of one large room and from the kitchen she was able to see everything in her living room. Thus, M.C. stated that while she was preparing dinner, she was able to monitor her children in the living room from the corner of her eye.

[11] After dinner, M.C. said she went out to a nearby store briefly to “get some pop”. The appellant agreed to stay behind to supervise the children. When M.C. returned, she found the two children seated on the living room couch with the appellant. M.C. said that, apart from her brief trip to the store, she was always in the presence of her children, including the complainant, when the appellant was there that day. M.C. did not notice any inappropriate conduct by the appellant any time that day.

[12] After the appellant left late that night, the complainant told her mother, M.C., that the appellant had shown her a picture of a woman’s “private area” on his phone. The complainant did not mention being touched sexually by the appellant.

[13] Some weeks later, the complainant told her stepmother, A.M., that the appellant had shown her a picture of a “naked little girl”. A.M. (who was called as a defence witness) testified that she asked the complainant if the appellant had ever touched her, and the complainant replied that he had not.

[14] The complainant's disclosures to her mother and stepmother led to the complainant making a statement to police, following which the appellant was charged with the offences identified above.

The Two Incidents

[15] The first incident (the "Photograph Incident") occurred after the complainant's mother left for the store on the evening in question. During the complainant's police interview, she said that, while her mother was at the store, the appellant showed her and her sibling a "nasty picture" of a "girl private" on his phone. She did not know the name of the "private part" but described it as "the front one".

[16] In her statement to the police, the complainant also described a second incident (the "Touching Incident") which she said occurred after her mother had returned from the store. The complainant said she was sitting with the appellant on the couch in the living room when the appellant touched and inserted his finger into her "private part". She told him repeatedly to stop, which he eventually did. The complainant said that during the touching, her mother was in the kitchen.

[17] Further, the complainant confirmed throughout her evidence in chief, as well as a number of times during her cross-examination, that her mother was present during the Touching Incident. She also said that the appellant told her to wait until her mother left and that they would go upstairs and take a nap together. However,

at one point on the afternoon of the first day of her cross-examination on May 3, 2021, the complainant said that her mother had been out at the store when the Touching Incident had occurred. At this point, the Crown objected, arguing that the questions from defence counsel had been confusing, as it was unclear which of the two incidents (i.e. the Photograph Incident as opposed to the Touching Incident) was being referred to. Crown counsel then suggested that the complainant was too tired and inattentive to continue and that the trial be adjourned for the day, a suggestion that was accepted by the trial judge.

[18] When the trial resumed a couple of days later, defence counsel resumed cross-examination and clarified with the complainant that the Touching Incident had occurred after her mother had returned from the store and was in the kitchen.

[19] In addition to the evidence of the complainant and M.C., the Crown's case also included the evidence of the officer in charge of the investigation. The officer testified that the appellant's cell phone was seized during his arrest. In the cell phone extraction, police found six photographs of nude females with their vaginal area exposed, similar to what the complainant had described being shown.

Closing Submissions

[20] In their closing submissions, both counsel proceeded on the basis that the complainant's evidence was that her mother had been present during the Touching Incident. Defence counsel highlighted this fact in support of her argument by noting

that it was extremely implausible that the appellant would have inappropriately touched the complainant when her mother was nearby and could have seen what was happening. Moreover, defence counsel pointed out that M.C. said she was able to see everything going on in the living room and yet had not noticed the appellant inappropriately touching the complainant. Counsel argued that M.C.'s presence when the Touching Incident was alleged to have taken place supported the conclusion that the Crown had failed to prove the appellant's guilt beyond a reasonable doubt.

[21] In the course of her closing submissions, Crown counsel noted that there was some inconsistency in the complainant's evidence as to whether or not her mother had been present during the Touching Incident. The Crown pointed out that on the afternoon of the first day of her cross-examination, the complainant had said that her mother was at Walmart when the appellant had touched her. However, Crown counsel reminded the trial judge that the complainant had been extremely unfocused during this part of her cross-examination and that, throughout the rest of her evidence, the complainant had consistently maintained that her mother was present during the Touching Incident.

[22] Crown counsel urged the trial judge to proceed on the basis that M.C. had been present during the Touching Incident and that, in fact, it was M.C.'s presence that had prompted the appellant to cease touching the complainant when the latter had told him to stop. Crown counsel also argued that, while M.C. claimed to have

been watching the complainant out of the corner of her eye while she was preparing dinner, it was likely that she had been distracted and thus had simply not seen the Touching Incident when it had occurred. Therefore, the fact that M.C. had been present during the Touching Incident but did not observe anything inappropriate did not give rise to a reasonable doubt as to whether the incident had in fact occurred.

The Trial Judge's Reasons for Judgment

[23] The trial judge commenced his reasons for judgment by noting that in the complainant's examination in chief, including her police statement which had been admitted pursuant to s. 715.1(1) of the *Criminal Code*, she had testified that on the day in question she was "home alone with [the appellant], her mother's friend, and her brother. When her mother left, the accused was touching her and going into her pants."

[24] I pause her to make two preliminary observations. First, as will be explained below, the trial judge later relies on this description of the Touching Incident, including the fact that the complainant's evidence was that her mother was out at the store at the relevant time, to find that the Crown had proven the appellant's guilt beyond a reasonable doubt.

[25] Second, the trial judge's description of the complainant's evidence in this regard was clearly mistaken. Throughout her examination in chief, including her

police statement, the complainant had said a number of times that her mother was present in the kitchen during the Touching Incident.

[26] The trial judge then noted that "[t]here were some inconsistencies in [the complainant's] testimony under cross-examination in regard to where her mother was when it [the Touching Incident] occurred and if one or two hands were used."

[27] After reproducing various passages from the transcript of the complainant's police statement, the trial judge observes that in her cross-examination on the afternoon of the first day, the complainant had been "very active, constantly in motion, screaming and restless." The trial judge further commented that she was otherwise very calm when testifying and finds that, apart from the cross-examination on the afternoon of May 3, 2021, the complainant was a very responsive and compelling witness. He concludes his assessment of her credibility as follows:

> I find that her testimony, with the exception of the afternoon behaviour that I just mentioned, is very responsive and compelling. I find that any minor inconsistency in her testimony, as I alluded to earlier, were as a result of immaturity, confusion and not filled with falsehoods. I find that overall, her testimony was relatively clear and that it had the ring of truth to it and was compelling. I find, on totality, that the complainant was both a credible and reliable witness.

[28] The trial judge also found M.C., the complainant's mother, to be a credible and reliable witness. Specifically, he accepted her evidence that the appellant was

alone with the children while she went out to the store and therefore had the opportunity to commit the alleged offenses.

[29] The trial judge further accepted the evidence of the officer in charge, as well as that of the complainant's stepmother, A.M.

[30] The trial judge concluded his reasons by finding that the appellant "touched the complainant as described by her and showed her sexually explicit pictures, as described" (emphasis added). The Crown had therefore established the guilt of the appellant on all counts in the indictment beyond a reasonable doubt.

C. GOVERNING PRINCIPLES

[31] The parties are agreed that a trial judge's findings of fact are entitled to great deference on appeal. This is particularly pertinent in sexual assault cases when a trial judge's findings of credibility are challenged on appeal. As the Supreme Court of Canada pointedly emphasized recently in *R. v. G.F.*, 2021 SCC 20, 404 C.C.C. (3d) 1, at para. 76, appellate courts should not "scrutinize the text of trial reasons in a search for error, particularly in sexual assault cases, where safe convictions after fair trials are being overturned not on the basis of legal error but on the basis of parsing imperfect or summary expression on the part of the trial judge."

[32] It is for that reason, amongst others, that the standard for miscarriage of justice due to a misapprehension of evidence is a stringent one. A misapprehension of evidence amounts to a reversible error only where the judge

is mistaken as to the substance of material evidence, and those errors play an essential part in the reasoning process resulting in a conviction: *R. v. Lohrer*, 2004 SCC 80, [2004] 3 S.C.R. 732, at para. 2.

[33] At the same time, if an accused can demonstrate that the conviction does depend on a misapprehension of the evidence, then the accused has not received a fair trial and the resulting conviction must be set aside. This is so even if the evidence, as actually adduced at trial, was capable of supporting a conviction: *Lohrer*, at para. 1.

[34] Turning to the principles applicable in determining the sufficiency of reasons, the proper approach to appellate review is functional and contextual. The trial judge's reasons are to be read as a whole, having regard to the live issues at trial, in order to assess whether the reasons explain what the trial judge decided and why they decided that way, in a manner that permits effective appellate review: *G.F.*, at para. 69.

[35] A trial judge is not required to explicitly discuss all the evidence or answer every argument raised by counsel. At the same time, as this court noted in *R. v. A.M.*, 2014 ONCA 769, 123 O.R. (3d) 536, at para. 14, a trial judge should address and explain how they have resolved major inconsistencies in the evidence of material witnesses. The inquiry into the sufficiency of reasons should be directed at whether the reasons respond to the case's live issues: *R. v. Dinardo*, 2008 SCC

24, [2008] 1 S.C.R. 788, at para. 31; *R. v. R.E.M.*, 2008 SCC 51, [2008] 3 S.C.R. 3, at para. 17. Where ambiguities in a trial judge's reasons are open to multiple interpretations, those that are consistent with the presumption of correct application must be preferred over those that suggest error. It is only where ambiguities, in the context of the record as a whole, render the path taken by the trial judge unintelligible that appellate review is frustrated: *G.F.*, at para. 79.

[36] Finally, it is well established that the evidence of child witnesses must be approached in a common-sense manner, taking into account the age of the witness and the fact that children experience the world differently than adults. In particular, although children may not be able to recount precise details such as the when and where of an event with exactitude, "this does not mean that they have misconceived what happened to them and who did it.": *R. v. B.(G.)*, [1990] 2 S.C.R. 30, at p. 55.

D. DISCUSSION

(1) The trial judge misapprehended the complainant's evidence as to whether her mother was present when the Touching Incident occurred

[37] As noted above, the trial judge proceeded on the basis that the complainant's evidence was that her mother was out at the store when the Touching Incident occurred.

[38] In fact, the opposite was true. Throughout her examination in chief and through most of her cross-examination, the complainant had testified that her mother was present when the Touching Incident occurred.

[39] To be sure, at one point in her cross-examination on the afternoon of the first day of the trial, the complainant had said that her mother was out at Walmart when the Touching Incident took place. However, in her closing submissions Crown counsel had urged the trial judge to disregard this part of her evidence since the complainant was visibly tired and distracted at this time.

[40] In his analysis of the complainant's credibility, the trial judge adopted the Crown's suggestion in this regard. He noted that, although the complainant's evidence was that her mother was out at the store when the Touching Incident had taken place, there were some "minor inconsistencies" on this point during her cross-examination on the afternoon of the first day. But the trial judge pointed out that the complainant had been very active and restless at this point in her cross-examination. He therefore discounted these "minor inconsistencies" on the basis that they were attributable to her immaturity and confusion. Her evidence was otherwise "very responsive and compelling", and he found that the complainant was overall a credible and reliable witness.

[41] Based on the complainant's evidence that her mother was out at the store when the Touching Incident occurred, combined with the fact that M.C. said that

she had left the complainant alone with the appellant when she went to the store, the trial judge found that the Crown had established the appellant's guilt on the charges alleged beyond a reasonable doubt.

[42] Crown counsel maintains that the trial judge did not misapprehend the complainant's evidence as to whether her mother was present when the Touching Incident occurred. The Crown argues, instead, that the trial judge correctly understood the complainant's evidence on this point but simply rejected her evidence as to whether her mother was present during the Touching Incident. The Crown argues that the trial judge was entitled to reject this part of the complainant's evidence and find that the Touching Incident had occurred when M.C. was out at the store.

[43] With respect, this is not what the trial judge actually did. In fact, he did precisely the opposite. The trial judge did disregard the minor inconsistencies in the appellant's cross-examination on the afternoon of the first day, finding that these inconsistencies were attributable to her young age and the confusing nature of the questions. But the trial judge found the remainder of the complainant's evidence to be compelling, credible, and reliable. Far from rejecting her evidence as to whether her mother was present during the Touching Incident, he relied upon his mistaken understanding of the complainant's evidence on this point and found that the appellant had sexually touched the complainant when her mother was out at the store. This is reflected in the trial judge's finding that the appellant touched

the complainant “as described by her”, and as the trial judge had set out in the opening paragraphs of his reasons.

[44] What of the fact that the complainant is a child witness and, thus, any inconsistencies in her evidence should be assessed in a common sense manner, consistent with the principles set out in *B.(G.)*? It was obviously open to the trial judge to find the complainant to be a credible witness notwithstanding the inconsistencies in her evidence as to whether her mother was home at the time of the Touching Incident. But the fact that the complainant is a child witness does not relieve the trial judge of his obligation to correctly understand what the complainant’s evidence actually was. If a witness testifies to “X” but the trial judge mistakenly believes that the witness testified to “Y”, the age of the witness matters not. In such a circumstance the problem is not with the witness’ evidence but, rather, with the trial judge’s misunderstanding of that evidence.

[45] In my view, this is what happened here. The trial judge made a point to clarify that he did indeed find the complainant a credible and reliable witness. However, he incorrectly believed that the complainant testified that her mother was out at the store when the Touching Incident occurred. He then relied on that mistaken understanding in making his finding, in the penultimate paragraph of his reasons, that the Touching Incident occurred when the complainant’s mother was out at the store.

(2) The trial judge's misapprehension of the evidence was material and essential to his reasoning process

[46] As noted above, if a trial judge misapprehends evidence but that misunderstanding is peripheral to his or her reasoning, no reversible error has occurred: *Lohrer*, at para. 2. Rather, a miscarriage of justice only occurs where the misapprehension plays an essential part in the reasoning process resulting in a conviction.

[47] In my respectful view, the trial judge's misapprehension of the evidence as described above did play an essential role in his finding of guilt on the first two counts in the indictment. Because he mistakenly believed that the complainant's evidence was that her mother was out at the store during the Touching Incident, the trial judge proceeded to find that this is in fact when the Touching Incident had taken place. He also noted that the complainant's evidence on this point was consistent with that of M.C., who had testified that she had left the appellant alone with her two children when she went out to the store. This alignment between the complainant's evidence and that of M.C.'s led the trial judge to find that the Crown had established the guilt of the appellant beyond a reasonable doubt.

[48] *B.(G.)* instructs us that the evidence of child witnesses on peripheral or incidental matters, such as time and place, should not necessarily lead the trier of fact to question their credibility or reliability. However, in my respectful view, this observation, while true, is beside the point in this appeal. Rather, the key question

is whether the misapprehension regarding the complainant's evidence on M.C.'s whereabouts played a material and essential role in the trial judge's *reasoning process*. If such a misapprehension was material to the reasoning of the trial judge, rather than peripheral, then that error cannot be overcome by the fact that the trial judge might have convicted the accused based on a different chain of reasoning.

[49] It follows that the appellant's convictions in relation to the Touching Incident were not based exclusively on the evidence and were not "true" verdicts: *Lohrer*, at para. 1. In reaching this conclusion, I make no comment on whether the evidence adduced at trial could have supported a conviction on an alternative basis. As Doherty J.A. noted in *R. v. Morrissey*, [1995] 22 O.R. (3rd) 514 (C.A.), if the appellant can demonstrate that a conviction depends upon a misapprehension of the evidence, it follows that he has not received a fair trial and was the victim of a miscarriage of justice. In these circumstances, the only appropriate remedy is to set aside the convictions on the first two counts in the Indictment, relating to the Touching Incident.

(3) The convictions must also be set aside because the trial judge's reasons did not respond to the case's live issues

[50] As discussed above, in order for a trial judge's reasons to be factually and legally sufficient, the judge must resolve major inconsistencies in the evidence of material witnesses and respond to the case's live issues.

[51] In this case, a key challenge for the Crown was to explain how M.C. did not observe any inappropriate conduct on the part of the appellant, despite the fact that the complainant's evidence was that M.C. was present at the time of the Touching Incident. The significance of the issue is reflected in the fact that both Crown and defence counsel devoted a good part of their closing submissions to it.

[52] The trial judge avoided the issue entirely by finding that the Touching Incident had taken place when M.C. was out at the store. But, as noted above, this finding was based upon his erroneous understanding of the complainant's evidence. As such, the reasons failed to grapple with a central issue that had to be resolved in order to establish the guilt of the appellant beyond a reasonable doubt. Such reasons fall below the standard required for legally and factually sufficient reasons: *A.M.*, at para. 14.

(4) While the convictions for sexual assault and sexual interference must be set aside, the same conclusion does not follow in relation to the offence of making available sexually explicit material

[53] Either of the legal errors described above, taken alone or in combination, lead inevitably to the conclusion that the appellant's convictions for sexual assault and sexual interference must be set aside and a new trial ordered on those counts.

[54] But in my view, neither of these errors affect the appellant's conviction on the count of making available sexually explicit material to a person under the age of 16. The trial judge correctly understood the complainant's evidence to be that

the appellant had shown her a picture of a naked woman when her mother was out at the store. Nor was there any inconsistency between the complainant's evidence in this regard and the evidence of the other witnesses in the case.

[55] Indeed, there was a significant body of other evidence corroborating the complainant's account in relation to the Photograph Incident, including particularly the evidence of the officer in charge that sexually explicit photographs were found on the appellant's phone. I would therefore not disturb the appellant's conviction for making available sexually explicit materials to a person under the age of 16.

E. DISPOSITION

[56] I would allow the appeal in part and set aside the appellant's convictions for sexual assault and sexual interference. I would dismiss the appeal of his conviction for making available sexually explicit material to a person under the age of 16.

"P.J. Monahan J.A."
"I agree. David Brown J.A."

Hourigan J.A. (dissenting):

A. INTRODUCTION

[57] The Supreme Court's jurisprudence mandates that a common sense approach be applied to assessing the evidence of child witnesses: *R. v. W.(R.)*, [1992] 2 S.C.R. 122, at p. 133; *R. v. B.(G.)*, at p. 55. This approach recognizes that children often experience the world differently than adults. For example, child sexual abuse victims may not remember details such as time and place, but that imprecision does not necessarily mean the child misconceived what happened to them and who did it. This direction reflects the reality that children cognitively process information differently than adults. When courts ignore the common sense approach for child witnesses, they fail to fulfill their duties to ensure a fair trial and do not give proper effect to children's evidence, rendering them voiceless.

[58] In this case, the trial judge was well aware of these special considerations and cited binding authority on the issue. To fairly evaluate his reasons, his explicit acknowledgement of the law in this regard must be considered when determining whether he materially misapprehended the evidence and whether his reasons are sufficient to permit appellate review.

[59] Regarding the material misapprehension of evidence, the appellant asserts that the trial judge materially misapprehended the complainant's evidence regarding where her mother was located at the time of the Touching Incident and relied on it to make a factual finding that she was not present in the family home.

This assertion is incorrect. There was no misapprehension of the evidence. The trial judge recognized that the complainant's evidence regarding the location of her mother was inconsistent, and he did not rely on it to make a factual finding on the issue. However, applying the common sense direction from the Supreme Court, he still found that she was a credible and reliable witness. He then relied on the mother's evidence to find that she was out of the family home at the time of the Touching Incident. That analysis was not based on a misapprehension of evidence, and it was otherwise free from error. Accordingly, this ground of appeal must fail.

[60] Regarding the sufficiency of the reasons, the Supreme Court has repeatedly warned intermediate courts of appeal that reasons are not rendered immune from appellate review simply because they could have been written better or more clearly. In this case, the trial judge's reasons were not strong, as they could have better explained his reasoning process. However, that does not render them immune from appellate review. Functionally read and in the context of the record, they provide a sufficient basis for this court to consider the appellant's submissions, and they explain why the trial judge was satisfied beyond a reasonable doubt that the Crown had met its burden.

[61] In this regard, two points are worth emphasizing. First, the trial judge explicitly and correctly applied the direction from the Supreme Court regarding the common sense approach to the evidence of child witnesses. Second, the trial

judge drew a connection between the complainant's evidence that the appellant showed her a picture of a vagina (the "Photograph Incident") and the photographs that police found on his phone to support his credibility finding regarding the complainant. Therefore, I would also dismiss this ground of appeal.

[62] In short, there was no material misapprehension of evidence, and the reasons are susceptible to appellate review. This dissent explains why I would dismiss the appeal.

B. ANALYSIS

(1) Misapprehension of Evidence

(a) Law on Child Witnesses

[63] Before considering the appellant's submission on the issue of the alleged misapprehension of evidence, it is helpful to review the law regarding child witnesses, as the appeal focuses on the evidence of a child complainant. Remarkably, until the late 1980s, Canadian courts treated child witnesses as unwelcome participants in our justice system, deeming them inherently unreliable: see e.g., *W.(R.)*, at pp. 132-33; Nicholas Bala, Angela Evans & Emily Bala, "Hearing the Voices of Children in Canada's Criminal Justice System: Recognising Capacity and Facilitating Testimony" (2010) 22:1 Child & Fam. L.Q. 21, at pp. 21-23.

[64] In the 1970s and 1980s, adult survivors of childhood sexual abuse began to come forward, shining the light on the abuse of vulnerable children by adults in positions of authority, including family members and trusted community figures: see Bala, at pp. 21-23. As the scope of the child abuse problem in Canada became more well-known and new psychological research confirmed that children could be reliable witnesses, Parliament reformed the law to permit children to testify effectively: see Bala, at p. 23.

[65] Jurisprudence from the Supreme Court has provided guidance on how trial judges should assess the testimony of child witnesses. The starting point of this new common sense approach to the assessment of child witnesses is the comments of Wilson J. in *B.(G.)*, at p. 55, where she stated:

> While children may not be able to recount precise details and communicate the when and where of an event with exactitude, this does not mean that they have misconceived what happened to them and who did it. In recent years we have adopted a much more benign attitude to children's evidence, lessening the strict standards of oath taking and corroboration, and I believe that this is a desirable development. The credibility of every witness who testifies before the courts must, of course, be carefully assessed but the standard of the "reasonable adult" is not necessarily appropriate in assessing the credibility of young children.

[66] The Supreme Court had occasion to revisit the issue of child witnesses two years later in *W.(R.)*. In that case, a central issue was whether the court of appeal erred in the way it approached the evidence of a child witness by applying dated

stereotypes. The court held, at p. 134, that the presence of inconsistencies, particularly in relation to peripheral matters (e.g., time and place), should be considered in context and in relation to the age of the complainant at the time of the event(s):

> [W]e approach the evidence of children not from the perspective of rigid stereotypes, but on what Wilson J. called a "common sense" basis, taking into account the strengths and weaknesses which characterize the evidence offered in the particular case.
>
> It is neither desirable nor possible to state hard and fast rules as to when a witness's evidence should be assessed by reference to "adult" or "child" standards—to do so would be to create anew stereotypes potentially as rigid and unjust as those which the recent developments in the law's approach to children's evidence have been designed to dispel. Every person giving testimony in court, of whatever age, is an individual, whose credibility and evidence must be assessed by reference to criteria appropriate to her mental development, understanding and ability to communicate. But I would add this. In general, where an adult is testifying as to events which occurred when she was a child, her credibility should be assessed according to criteria applicable to her as an adult witness. Yet with regard to her evidence pertaining to events which occurred in childhood, the presence of inconsistencies, particularly as to peripheral matters such as time and location, should be considered in the context of the age of the witness at the time of the events to which she is testifying. [Emphasis added.]

[67] These cases remain good law some thirty years later. Courts across the country have followed the guidance of the Supreme Court to take a common sense approach to assessing the testimony of child witnesses having regard to the differences in the way children and adults process and communicate information.

Part of this common sense approach is a focus on the complainant's credibility regarding their core allegations rather than on periphery matters.

[68] A good example of this focus on core allegations is *R. v. A.T.*, 2014 ONCA 126, which was an appeal of sexual assault and sexual interference convictions based on an alleged misapprehension of evidence. In dismissing the appeal, this court noted the following, at para. 6, regarding the seven-year-old complainant's evidence: "While there were some inconsistencies and mistakes in her evidence, she never resiled from the core of her initial complaint that she was sexually assaulted by her daddy who placed his finger or fingers in her bum, and she did not waver from her claim that the perpetrator of the sexual assault was the appellant." The court went on to dismiss the appeal on the basis that the trial judge correctly applied the common sense approach mandated by the Supreme Court in considering the testimony that did not touch upon the core allegations: *A.T.*, at paras. 7-8.

[69] With these legal principles in mind, I turn now to an analysis of the appellant's contention that the trial judge misapprehended the evidence of the complainant. As will become apparent, a central issue in this case is whether the trial judge correctly applied the common sense approach in his assessment of the complainant's evidence.

(b) Evidence and Trial Judge's Analysis

[70] My colleagues have sufficiently reviewed the background information to contextualize the issues on this appeal. It is unnecessary to repeat that factual recitation. Instead, I will focus on the evidence regarding the mother's location during the incidents and the trial judge's treatment of that evidence.

[71] At trial, it was uncontentious that the complainant's mother was at the store during the Photograph Incident – both witnesses' evidence aligned on this point. The mother testified that she left her children in the appellant's care while she went to the store. The complainant's evidence was that, while her mother was at the store, the appellant showed her a picture of a vagina. The crux of the appellant's submission on this ground of appeal is that the trial judge misapprehended the complainant's evidence regarding whether her mother was out of the house when the touching occurred. In reliance on that misapprehension, the trial judge is alleged to have made a factual finding on the issue. This submission is palpably erroneous and refuted by reviewing the reasons.

[72] The appellant seizes on the following statement made by the trial judge at p. 158 of his reasons: "She testified that on the day in question, she was home alone with [the appellant], her mother's friend, and her brother. When her mother left, the accused was touching her and going into her pants." The appellant submits that this statement was a factual finding that resulted from a misapprehension of

evidence. That is inaccurate. The reference to this testimony was part of the trial judge's recitation of the conflicting evidence he heard from the complainant on the issue of where her mother was located at the time of the incidents. Further, the statement itself is accurate as the complainant testified during her cross-examination that her mother was out.

[73] To clarify the trial judge's treatment of this evidence, the other references in the reasons to the complainant's evidence regarding her mother's whereabouts are noted as follows:

- At p. 158, the trial judge states that during her cross-examination the complainant was inconsistent regarding her mother's location during the Touching Incident. That is accurate because she later recanted in her cross-examination the statement she previously made that her mother was out during the Touching Incident, indicating instead that she was home.
- At p. 159, the trial judge states, "And she indicated further that her mother was not home when that happened, so the mom was out. [The appellant] was alone with this girl then was taking the picture." It is unclear if this statement references the Photograph Incident or the Touching Incident.
- At p. 160, there is another reference to the complainant stating that her mother was out. However, this appears to be in relation to the Photograph Incident.
- At p. 161, the trial judge quotes the transcript of the witness interview where the complainant says her mother was in the kitchen during the Touching Incident.

[74] What is evident from the foregoing is that the trial judge never made a factual finding regarding the mother's whereabouts based on the complainant's testimony. Instead, he reviewed her evidence and specifically noted that it was inconsistent. Thus, the appellant's argument is built upon a faulty premise. He takes one statement in isolation and alleges a material misapprehension. That is not a fair reading of the reasons.

[75] The trial judge was alive to the inconsistencies in the complainant's testimony regarding where her mother was when the Touching Incident occurred. In the face of these inconsistencies, he instructed himself regarding the proper approach to assessing the credibility of child witnesses:

> When assessing the credibility of this child witness, I am familiar with and guided by the applicable principles as set out by the Supreme Court of Canada in dealing with young witnesses and the guidance is set out in three cases, *R. v. B.G*., [1992] SCR 30 and *R. v. W.R*., [1992] 2 S.C.R. 122 and *R. v. François*, [1994] 2 S.C.R. 827.

[76] Having instructed himself on the law, the trial judge made the following credibility assessment of the complainant:

> In assessing the credibility, I have considered the totality of her evidence and noted that her cross-examination, after the luncheon break, she was very active; constantly in motion, screaming and restless. When her testimony continued the next day she was very calm and she thought she was calmer in the morning, even before the afternoon luncheon break. I find that her testimony, with the exception of the afternoon behaviour that I just mentioned, is very responsive and compelling. I find that any minor inconsistency in her testimony, as I alluded to

> earlier, were as a result of immaturity, confusion and not filled with falsehoods. I find that overall, her testimony was relatively clear and that it had the ring of truth to it and was compelling. I find, on totality, that the complainant was both a credible and reliable witness. [Emphasis added.]

[77] That was the trial judge's finding on the complainant's credibility. In it, he applied the direction from the Supreme Court regarding child witnesses and was conscious of the impact of the complainant's maturity on her testimony. Thus, the trial judge explained why, despite the inconsistencies in the complainant's evidence, he believed her when she said she was touched by the appellant and was shown sexually explicit material. That conclusion, which was available to the trial judge on the evidence, is owed considerable deference from this court. It was not the product of any misapprehension of the evidence.

[78] The appellant raises a related concern. According to him, the trial judge ducked an important issue that could have raised a reasonable doubt about the touching charge. By failing to deal directly with the confusion in the complainant's testimony regarding the mother's location, he did not grapple with the appellant's assertion that it was doubtful he would touch the complainant when her mother was home. I note that underlying that assertion is the unproven notion that adults who sexually abuse children always act rationally and conduct themselves in a manner that reduces their chances of being caught. However, to consider this argument, I am prepared to accept that assertion.

[79] The full answer to this submission is found in the trial judge's reasons. He relied on the mother's evidence regarding where she was during the Touching Incident. She testified that she was with her two children the entire evening except during her trip to the store. Her evidence was that she did not see the appellant touch the complainant. The mother testified that there were no other days on which the children and the appellant were both home and that she only left the children alone with the appellant during her trip to the store.

[80] The trial judge accepted the mother's evidence: "In assessing her credibility I find that she credibly identified the accused and was credible and reliable about the accused being in her house in April and that he was alone with the children and therefore had the opportunity to commit the alleged offences." Therefore, the appellant's assertion could not raise a reasonable doubt because the trial judge was satisfied that the mother was not home at the time of the offences.

[81] It is trite law that a trial judge is entitled to accept some, none, or all of a witness's testimony. It was open to the trial judge to rely on the mother's evidence and find that the touching occurred when she was not present. His finding is also supported by the complainant's statement that she believed the appellant touched her genitals a short time after showing her the picture and her confirmation that both incidents happened on the same day. It was also open to the trial judge to accept the complainant's evidence that she was assaulted without accepting her

inconsistent account of her mother's whereabouts. On the core allegations, her evidence was unshaken.

[82] In summary, there was no misapprehension of evidence. Instead, the trial judge reviewed the evidence of the complainant regarding her mother's whereabouts, recognized that it was inconsistent, and, instead, chose to rely on the mother's evidence in that regard. In assessing the impact of the problems with the complainant's testimony, the trial judge was aware that it had to be considered in a manner consistent with the common sense approach mandated by the Supreme Court.

(2) Sufficiency of Reasons

[83] The law regarding the sufficiency of reasons ground of appeal has most recently been summarized by the Supreme Court of Canada in *R. v. G.F*. For present purposes, the following points, as canvassed by the Supreme Court, are worth noting:

- The Supreme Court has repeatedly emphasized the "importance of a functional and contextual reading of a trial judge's reasons when those reasons are alleged to be insufficient": *G.F.*, at para. 69.
- "'[B]ad reasons are not an independent ground of appeal": *G.F.*, at para. 70. Appeal courts have the narrow task of assessing "whether the reasons, read in context and as a whole, in light of the live issues at trial, explain what the trial judge decided and why they decided that way in a manner that permits effective appellate review": *G.F*., at para. 69.

- The Supreme Court has also emphasized the importance of reviewing the record when assessing the sufficiency of reasons: *G.F.*, at para. 70.
- Reasons must be factually sufficient. They must explain what the trial judge decided and why. This is "ordinarily a very low bar". "If the reasons do not explain the 'what' and the 'why', but the answers to those questions are clear in the record, there will be no error": *G.F.*, at paras. 70-71.
- Reasons must also be legally sufficient, which requires that the aggrieved party be able to exercise their right of appeal. This is "highly context specific and must be assessed in light of the live issues at trial." A trial judge is not obligated to discuss "features of criminal law that are not controversial in the case before them. This stems from the presumption of correct application – the presumption that 'the trial judge understands the basic principles of criminal law at issue in the trial'": *G.F.*, at para. 74 [Citations omitted.]
- To succeed on this ground of appeal, an appellant must demonstrate either error or the frustration of appellate review. "Where all that can be said is a trial judge may or might have erred, the appellant has not discharged their burden to show actual error or the frustration of appellate review. Where ambiguities in a trial judge's reasons are open to multiple interpretations, those that are consistent with the presumption of correct application must be preferred over those that suggest error": *G.F.*, at para. 79.
- Credibility findings deserve "particular deference. While the law requires some articulation of the reasons for those findings, it also recognizes that…the trial judge is the fact finder and has the benefit of the intangible impact of conducting the trial." Objective, independent evidence may make credibility findings simpler. Articulating reasons for credibility findings in sexual assault cases, where the crime is often committed in private, can be more challenging: *G.F.*, at para. 81.

[84] In the case at bar, the appellant argues that the trial judge failed to explain how he resolved the inconsistencies between the mother's evidence and the complainant's evidence regarding the mother's whereabouts during the Touching Incident and failed to address the effect of these inconsistencies on the complainant's credibility and reliability. I do not give effect to this ground of appeal for two reasons.

[85] First, the trial judge instructed himself that he must assess the complainant's evidence consistent with the Supreme Court's guidance on assessing young witnesses' evidence, as canvassed above. This is not a case where the reviewing court needs to rely on the presumption that the trial judge understood the law because, in this case, the trial judge explicitly referenced these important principles. That jurisprudence makes clear that children experience the world differently than adults, and details such as time and place may be absent from their recollection. Imprecision concerning detail does not necessarily mean the child misconceived what happened to them and who did it. Nor should contradictions in a child's evidence necessarily be given the same effect as similar flaws in an adult's testimony. I note in this regard that the primary challenge to the complainant's credibility does not focus on whether the Touching Incident occurred – the core allegation – but on who was in the house at the time. The trial judge's adoption of these principles is one way in which he addressed the effect of

inconsistencies on the complainant's credibility and reliability. In following the Supreme Court's guidance, he cannot be faulted.

[86] Second, as noted by the Supreme Court in *G.F.*, it is essential that an appeal court thoroughly review the record when assessing the sufficiency of a trial judge's reasons. Recall that there were two allegations made by the complainant in this case: sexual touching by the appellant and that the appellant showed her pictures of a young person's vagina. In oral argument, it was raised with the appellant's counsel whether the trial judge could use the existence of the photographs on the appellant's phone to assess the complainant's credibility. Counsel acceded that the photographs could be used for this purpose but stated that the trial judge failed to do so in his reasons.

[87] Counsel's position in this regard can most charitably be described as an obtuse reading of the reasons. The trial judge carefully reviewed the evidence of the police officer who searched the phone, referring to the fact that the appellant's phone contained six pictures that met the description of a young person's vagina. He explicitly found that this testimony "partially corroborated the complainant's testimony". Thus, the trial judge drew a connection between the complainant's evidence that the accused showed her a picture of a vagina and the photographs police found on his phone. By explaining that this evidence corroborated a portion of the complainant's testimony, the trial judge provided an additional reason for

accepting her evidence about the appellant's actions. This was powerful objective evidence that bolstered the complainant's credibility and reliability.

[88] Undertaking a functional and contextual reading of the reasons, with due regard to the record, reveals that they are legally and factually sufficient. The reasons deal primarily with credibility findings, which are owed particular deference. Further, to the extent that there are ambiguities in the reasons, they must be interpreted in a manner consistent with the presumption of correct application. I would dismiss this ground of appeal.

C. CONCLUSION

[89] This is a misapprehension of evidence appeal where even a cursory review of the reasons demonstrates that there was no misapprehension. It is an insufficiency of reasons appeal where to accede to the appellant's submission would require this court to ignore the instructions from the Supreme Court in *G.F*. More importantly, it is an appeal where we are asked to ignore the trial judge's use of the common sense approach in assessing child witnesses. That is a troubling invitation that risks turning back the clock to a time when child witnesses were unwelcome participants in our justice system. I would dismiss the appeal.

Released: September 11, 2023 "C.W.H."

"C.W. Hourigan J.A."